IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No.478 of 2005

Decided on: August 8, 2006

Shiv Singh **.....Appellant.**

VERSUS

Hakam Singh and others **.....Respondents.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?

For the Appellants : **Mr. Bhupender Gupta, Senior Advocate, with Mr. Neeraj Gupta, Advocate.**

For the respondents : **Mr. R.K. Sharma, Advocate.**

Surjit Singh, Judge (Oral)

Heard and gone through the record.

2. This is a defendant's appeal against the judgment and decree of the trial Court, as affirmed by the first Appellate Court, whereby besides having been restrained by a decree of permanent prohibitory injunction from interfering in the land bearing Khasra Nos.408 and 410, belonging to the respondents-plaintiffs, the appellant-defendant has been directed, by way of mandatory injunction, to demolish the latrine constructed by him over a portion of the aforesaid land and to vacate the encroachment made by him on a portion of the suit land to the extent of 3 *marlas* by raising latrine.

3. First, the facts may be noticed. Respondents-plaintiffs filed a suit for issuance of permanent prohibitory injunction restraining the appellant-defendant from causing any interference in

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Whether the reporters of the local papers may be allowed to see the judgment?

their above described land. It was alleged that in the month of September, 1989, appellant-defendant had started digging the suit land in order to raise construction over a portion of the same without any right, title or interest. Appellant-defendant contested the suit. He claimed that he was owner of the adjoining land, bearing Khasra Nos.409 and 344, and that he had not made any encroachment on the suit land nor did he intend or threat to do so. It was alleged that as a matter of fact the plaintiffs, in connivance with the revenue staff, had got the *Sadar Aks Musabi*, pertaining to the suit land, tampered with about which an enquiry was pending.

4. The trial Court framed various issues. Parties went to trial. At the end of the trial, it was held that the appellant-defendant had made encroachment on a portion of the suit land to the extent of 3 *Marlas,* as depicted in *Aks Shajra* Ex. P-3 and accordingly decree was passed. In appeal, filed by the appellant-defendant, the District Judge has affirmed the decree. Now, the appellant-defendant has approached this Court.

5. Learned counsel for the appellant-defendant submitted that as a matter of fact, length of one side of Khasra No.344, belonging to the appellant-defendant, adjoining Khasra No.410 of the plaintiffs, had been changed surreptitiously by the field revenue staff and that it was because of that change that when the demarcation was carried out by the Local Commissioner in 1991, the result went against the appellant-defendant. He urged that the aforesaid change had been made in the year 1988-89 and the demarcation was carried out in the year 1991. He submitted that correction was carried out and the mischief committed by the field staff was undone on

7.1.1994, whereafter the copy of the correct *Musabi*, showing the length of the aforesaid side of Khasra No.344 correctly, was placed on the record of the trial court and a request was made for appointment of fresh Local Commissioner so as to carry out the demarcation in accordance with the correct length of the side of Khasra No.344, but the trial Court rejected that application, vide order dated 1.1.1997. He urged that had a fresh demarcation been carried out in accordance with the correct length of the said line of Khasra No.344, the result would have been different in the sense that no encroachment would have been reported. Ex. D-7 is the copy of the *Musabi* in which the dimensions of all the Khasra numbers, including Khasra No.344, are shown correctly, according to the appellant-defendant. The side of Khasra No.344, the length of which had allegedly been tampered with, measures 13 *Karams*, according to this document and the side of Khasra No.410, belonging to the plaintiffs, which is just below Khasra No.344, is shown to measure 15+2 *Karams*. The Local Commissioner, who carried out the demarcation in the year 1991, which demarcation is challenged on the ground that it is based on the tampered with dimensions of Khasra Nos. 344 and 410, shows that the dimensions were assumed by the Local Commissioner to the same, i.e. 13 *Karams* of Khasra No.344 and 15+2 *Karams* of Khasra No.410, as are shown in Ex. D-7. Now, when the Local Commissioner carried out the demarcation ignoring the wrong dimensions and assuming the dimensions to be the same as are shown after correction, vide order dated 7.1.1994, in Ex. D-7, trial Court was right in rejecting the prayer for appointment of fresh Local Commissioner.

6. Next point that has been urged by the learned counsel for the appellant is that when the plaintiffs had not prayed for the grant of relief of mandatory injunction, the two Courts below ought not to have granted that relief. It is true that the plaintiffs made no prayer for grant of mandatory injunction but the unchallenged testimony of the attorney of the plaintiffs, namely Hakam Chand, who appeared as a witness in the trial Court, proves that encroachment had been made on 3 *Marlas* land forming part of Khasra No.408 by constructing a latrine, and digging a pit after the institution of the suit. The witness stated that the encroachment had been raised by raising construction and digging a portion of the suit land for constructing a *Danga* after the stay was granted by the Court. By stay he undoubtedly meant a temporary injunction granted by the Court in the suit. Now, if the encroachment had been made during the pendency of the suit and that too after the grant of temporary injunction, it was within the competence and the jurisdiction of the trial Court to grant the decree of mandatory injunction even when prayer was not there in the plaint for grant of such relief, because the right to claim for such relief acquired during the pendency of the suit.

7. No other point has been urged. Since no substantial question of law arises, the appeal is dismissed.

CMP No.813 of 2005

Dismissed and the interim order, dated 16.9.2005, vacated.

August 8, 2006(sd) **(Surjit Singh, J.)**